Astana International Sdn Bhd & Ors v RHB Bank Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22–253 OF 2009
HADHARIAH JC
14 FEBRUARY 2012

Banking — Banker and customer — Duty of care — Transfer of funds and drawing of cheque with forged endorsements — Forgery — Whether proven — Whether disputed documents forged — Whether banker was acting under customer's mandate — Opening of unauthorised account — Whether directors' resolution for opening account valid — Whether first defendant acted as prudent banker — Whether first defendant liable for plaintiff's losses — Evidence Act 1950 s 73(1) — Companies Act 1965 s 156

Companies and Corporations — Resolutions — Directors' resolution — Resolution to open bank account — Whether valid — Whether resolution contravened mandatory requirement — Companies Act 1965 s 156

Evidence — Court's powers — Forgery — Specimen signature — Whether court could make comparison between disputed signatures and sample signatures — Evidence Act 1950 s 73(1)

The fourth defendant was at all material times a director and also group financial controller of the first, second and third plaintiff companies, which operated from Menara IGB in Mid Valley, Kuala Lumpur. The plaintiff companies were at all material times customers of the first defendant bank at Mid Valley, Kuala Lumpur. Unknown to the plaintiffs, the fourth defendant was also the largest shareholder and director in the second and third defendant companies, which had no business dealings with the plaintiffs. The plaintiffs had wholly trusted the fourth defendant and the CEO of the plaintiffs' companies ('the CEO') to supervise, control and manage all banking and financial affairs of the plaintiffs with the first defendant bank. However, on 23 January 2006 the fourth defendant had opened an unauthorised account bearing the first plaintiff's name, which the first plaintiff had never operated. Instead this account was operated only by the fourth defendant and was overdrawn by RM79,552.84, which was finally settled by the first plaintiff. As between January 2006 to June 2008, without the knowledge of the plaintiffs and the CEO, the fourth defendant had fraudulently caused 61 unauthorised transfers of funds of various amounts from the plaintiffs' banking accounts with the first defendant bank into the accounts of the second and third

defendants maintained with the same branch of the first defendant bank. These transfers were effected with written instructions purportedly signed by the fourth defendant and the CEO. In addition, the plaintiffs also discovered that the fourth defendant had drawn a cheque for RM2.3m without the authority of the first plaintiff company. The plaintiffs commenced a suit against the fourth defendant for breach of fiduciary duties, breach of trust and acting mala fide; against the second and third defendants for monies had and received; and against the first defendant bank for breach of contract, negligence and tort of conversion. On the day of the trial, the second, third and fourth defendants admitted to the claims against them and judgment was accordingly entered against them as prayed. As such, this trial proceeded only against the first defendant. The plaintiffs' case against the first defendant was based on the fact that the first defendant did not have the authority or mandate to pay out or debit the plaintiffs' accounts and that therefore the first defendant must be made liable for the improper opening of an account, the unauthorised transfers and unauthorised drawing upon the cheque. The plaintiffs adduced evidence through their expert witness to prove that the signatures that appeared on the disputed bank documents ('the disputed documents') were not the signatures of the CEO but forgeries. The plaintiffs submitted that the first defendant was negligent, in that it had neither called nor verified with the CEO whether the plaintiffs had authorised the said transfers and clearing of the cheque. The first defendant's only pleaded defence was that the opening of the unauthorised account, the transfer of funds and the clearing of the said cheque were effected in accordance with the mandate and instructions given by the plaintiffs to the first defendant and that the latter had neither breached this mandate nor acted negligently. As such, the first defendant argued that it was not liable to make good the losses suffered by the plaintiffs.

Held, allowing the plaintiffs' claim with interest and costs:

(1) This court noted that the evidence of the plaintiff's expert witness was neither conclusive nor binding on this court. However, the plaintiff's expert witness had done his duty, in that he had given reasons as to why 55 out of 59 signatures were not executed by the CEO. Thus, even though the first defendant challenged the report by the plaintiff's expert, this court decided to rely on this report as an aid to support its findings (see para 20).

(2) Pursuant to s 73(1) of the Evidence Act 1950, this court directed the CEO to give five specimen signatures ('the sample signatures') for the purpose of comparison with the disputed documents. The court then compared the sample signatures and the disputed documents and found the differences between the signatures to be obvious to the extent where without the aid of an expert it was obvious that the CEO's signature on the disputed documents were a forgery. The court thus concluded that the disputed documents were forged. Further, based on the facts of this

case and the admission of the fourth defendant, this court accepted the evidence of the CEO that he did not sign the disputed documents (see paras 23–24).

(3) The directors' resolution to open the unauthorised account ('the resolution') was invalid, in that it did not comply with s 156 of the Companies Act 1965. However, despite its invalidity and the major defects in the framing of the resolution itself, the first defendant's officers did not make any enquiries or verify with the first plaintiff or the CEO whether the resolution was genuine. Consequently the first defendant was negligent for opening the unauthorised account (see para 37).

(4) The first defendant's contention that they had followed the plaintiffs' mandate and their reasons for not verifying the plaintiffs' instructions with the CEO were all absurd. The explanations given by the first defendant's bank officers were an attempt by the first defendant to cover their mistakes in trusting the fourth defendant, who was only one of two signatories. The first defendant had therefore not acted as a prudent banker in similar circumstances. It had clearly acted in breach of the mandate given by the plaintiffs and was liable to the plaintiffs (see para 40).

(5) Further, since the first defendant had called the fourth defendant as its witness his evidence would form part of the first defendant's case. Applying that principle to the present case it followed that the fourth defendant's admission was sufficient proof of the plaintiffs' averment that these transactions were not authorised by them (see paras 42–43).

(6) As the disputed documents were forgeries, they could not constitute a valid mandate or authorisation from the plaintiffs to the first defendant. The forged instruments were a nullity. In the circumstances, it was not open to the first defendant to say that it had not obtained any benefit out of the transactions. A banker who paid out on such forged instruments was liable to make good the loss. Further, the first defendant's argument that the plaintiffs' were estopped from claiming against it had no merit at all. The plaintiffs had proven their case of unauthorised transactions against the first defendant on a balance of probabilities. As such, the first defendant was liable to the plaintiffs for the losses they had suffered (see paras 47–49).

[Bahasa Malaysia summary

Pada setiap masa matan defendan keempat adalah pengarah dan juga pengawal kumpulan kewangan kepada plaintif syarikat-syarikat pertama, kedua dan ketiga, yang beroperasi dari Menara IGB di Mid Valley, Kuala Lumpur. Pada setiap masa matan plaintif syarikat-syarikat adalah pelangan-pelanggan defendan pertama bank di Mid Valley, Kuala Lumpur. Tanpa diketahui plaintif-plaintif, defendan keempat juga pemegang saham terbesar dan

pengarah dalam syarikat-syarikat kedua dan ketiga, yang tiada urusan perniagaan dengan plaintif-plaintif. Plaintif-plaintif mempercayai sepenuhnya defendan keempat dan KPE akan syarikat-syarikat plaintif-plaintif ('KPE') untuk mengawasi, mengawal dan menguruskan semua urusan perbankan dan kewangan plaintif-plaintif dengan defendan pertama bank. Walau bagaimanapun, pada 23 Januari 2006 defendan keempat telah membuka akaun tanpa kebenaran atas nama plaintif pertama, yang mana tidak pernah digunakan oleh plaintif pertama. Sebaliknya akaun ini hanya dijalankan oleh defendan keempat dan terdapat pengeluaran RM79,552.84, yang akhirnya dilangsaikan oleh plaintif pertama. Antara bulan Januari 2006 hingga Jun 2008, tanpa pengetahuan plaintif-plaintif dan KPE, defendan keempat secara fraud telah menyebabkan 61 pindahan tanpa kebenaran untuk wang pelbagai jumlah daripada akaun-akaun perbankan plaintif-plaintif dengan defendan pertama bank ke dalam akaun-akaun defendan-defendan kedua dan ketiga yang diselenggarakan sama dengan cawangan defendan pertama bank. Pindahan-pindahan tersebut telah dilaksanakan atas arahan bertulis yang dikatakan telah ditandatangani oleh defendan keempat dan KPE. Tambahan pula, plaintif-plaintif juga mendapati bahawa defendan keempat telah mengeluarkan cek untuk RM2.3 juta tanpa kebenaran plaintif pertama syarikat. Plaintif-plaintif telah memulakan guaman terhadap defendan keempat kerana pelanggaran kewajipan fidusiari, pelanggaran amanah dan bertindak dengan niat jahat; terhadap defendan-defendan kedua dan ketiga untuk wang yang diterima; dan terhadap defendan pertama bank kerana pelanggaran kontrak, kecuaian dan tort kerana penukaran. Pada hari perbicaraan, defendan-defendan kedua, ketiga dan keempat mengaku tuntutan-tuntutan terhadap mereka dan penghakiman telah dimasukkan dengan wajar terhadap mereka seperti yang dipohon. Oleh itu, perbicaraan ini hanya diteruskan terhadap defendan pertama. Kes plaintif-plaintif terhadap defendan pertama adalah berdasarkan fakta bahawa defendan pertama tidak mempunyai kebenaran atau mandat untuk membayar keluar atau debit ke dalam akaun-akaun plaintif-plaintif dan oleh itu defendan pertama hendaklah bertanggungjawab kerana tidak membuka akaun dengan betul, membuat pindahan tanpa kebenaran dan keluaran tanpa kebenaran untuk cek. Plaintif-plaintif telah mengemukakan keterangan melalui saksi pakar mereka untuk membuktikan bahawa tandatangan yang terdapat pada dokumen-dokumen bank yang dipertikaikan ('dokumen yang dipertikaikan') bukan tandatangan KPE tetapi suatu pemalsuan. Plaintif-plaintif berhujah bahawa defendan pertama telah cuai, di mana ia tidak memanggil atau mengesahkan dengan KPE sama ada plaintif-plaintif telah membenarkan pindahan-pindahan dan keluaran cek tersebut. Satu-satunya pembelaan defendan pertama yang diplidkan adalah bahawa pembukaan akaun tanpa kebenaran, pindahan wang dan keluaran cek tersebut telah dilakukan menurut mandat dan arahan yang diberikan oleh plaintif-plaintif kepada defendan pertama dan bahawa defendan pertama tidak melanggar mandat ini atau telah bertindak cuai. Oleh itu, defendan pertama telah berhujah bahawa ia tidak

bertanggungjawab untuk membayar kerugian yang dialami oleh plaintif-plaintif. A

Diputuskan, membenarkan tuntutan plaintif-plaintif dengan faedah dan kos:

(1) Mahkamah ini mendapati bahawa keterangan saksi pakar plaintif tidak konklusif mahupun mengikat ke atas mahkamah ini. Walau bagaimanapun, saksi pakar plaintif telah melaksanakan kewajipannya, dengan memberi alasan kenapa 55 daripada 59 tandatangan tidak dilaksanakan oleh KPE. Oleh itu, walaupun defendan pertama mencabar laporan oleh pakar plaintif tersebut, mahkamah ini memutuskan untuk bergantung kepada laporan ini sebagai bantuan untuk menyokong penemuannya (lihat perenggan 20). B C

(2) Menurut s 73(1) Akta Keterangan 1950, mahkamah ini mengarahkan KPE untuk memberikan lima specimen tandatangan ('sampel tandatangan') bagi tujuan perbandingan dengan dokumen yang dipertikaikan. Mahkamah kemudian membandingkan sampel tandatangan dan dokumen yang dipertikaikan mendapati terdapat perbezaan antara tandatangan-tandatangan tersebut adalah jelas sehingga tidak memerlukan bantuan pakar pun ia adalah jelas bahawa tandatangan KPE atas dokumen yang dipertikaikan tersebut adalah suatu pemalsuan. Mahkamah dengan itu memutuskan bahawa dokumen yang dipertikaikan telah dipalsukan. Bahkan, berdasarkan fakta kes ini dan pengakuan defendan keempat, mahkamah menerima keterangan KPE bahawa dia tidak menandatangani dokumen yang dipertikaian tersebut (lihat perenggan 23–24). D E F

(3) Resolusi pengarah untuk membuka akaun tanpa kebenaran ('resolusi tersebut') adalah tidak sah, di mana ia tidak mematuhi s 156 Akta Syarikat 1956. Walau bagaimaanpun, meskipun terdapat ketaksahan dan kecacatan besar dalam membuat resolusi tersebut, pegawai defendan pertama tidak membuat apa-apa siasatan atau pengesahan dengan plaintif pertama atau KPE sama ada resolusi tersebut adalah tulen. Berikutan itu defendan pertama didapati cuai kerana membuka akaun tanpa kebenaran (lihat perenggan 37). G H

(4) Hujah defendan pertama bahawa mereka telah menurut mandat plaintif-plaintif dan alasan-alasan mereka kerana tidak mengesahkan arahan-arahan plaintif-plaintif dengan KPE tidak masuk akal langsung. Semua penjelasan yang diberikan oleh pegawai bank defendan pertama adalah percubaan oleh defendan pertama untuk menutup kesilapan mereka kerana mempercayai defendan keempat, yang hanya merupakan salah seorang daripada dua oleh penandatangan. Defendan pertama dengan itu telah bertindak sebagai pegawai bank yang waras dalam keadaan sama. Adalah jelas bahawa ia telah melanggar mandat yang I

diberikan oleh plaintif-plaintif dan adalah bertanggungjawab terhadap plaintif-plaintif (lihat perenggan 40).

(5) Selanjutnya, oleh kerana defendan pertama telah memanggil defendan keempat sebagai saksinya, keterangannya akan membentuk sebahagian daripada kes defendan pertama. Dengan menerima pakai prinsip tersebut kepada kes ini adalah diikut bahawa pengakuan defendan pertama adalah bukti mencukupi berhubung penegasan plaintif-plaintif bahawa transaksi tersebut adalah tanpa kebenaran mereka (lihat perenggan 42–43).

(6) Oleh kerana dokumen yang dipertikaikan adalah palsu, ia tidak boleh membentuk mandat atau kebenaran sah daripada plaintif-plaintif kepada defendan pertama. Instrumen yang dipalsukan adalah terbatal. Dalam keadaan berikut, adalah tidak terbuka untuk defendan pertama untuk mengatakan bahawa ia tidak mendapat apa-apa faedah daripada transaksi tersebut. Pegawai bank yang dibayar daripada instrumen palsu tersebut adalah bertanggungjawab untuk untuk membayar kerugian itu. Selanjutnya, hujah defendan pertama bahawa plaintif-plaintif telah diestopkan daripada menuntut daripadanya adalah tidak bermerit langsung. Plaintif-plaintif telah membuktikan kes mereka berhubung transaksi tanpa kebenaran tersebut terhadap defendan pertama atas imbangan kebarangkalian. Oleh itu, defendan pertama adalah bertanggungjawab terhadap plaintif-plaintif kerana kerugian yang dialami mereka (lihat perenggan 47–49).]

Notes

For cases on court in general, see 7(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1197–1198.

For cases on duty of care of banker and customer, see 1(2) *Mallal's Digest* (4th Ed 2010 Reissue) paras 2114–2122.

For cases on resolutions in general, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 809–817.

Cases referred to

Bale v Parr's Bank Ltd (1909) 25 TLR 549, KDB (refd)

Bank of Montreal v Dominion Gresham Guarantee and Casualty Co Ltd [1930] AC 659, PC (refd)

M Mahadevan v S Lourdenadin [1988] 2 MLJ 371; [1988] 1 CLJ(Rep) 168, SC (refd)

Formosa Resort Properties Sdn Bhd v Bank Bumiputra Malaysia Bhd [2011] 4 MLJ 651, CA (refd)

Globelink Container Line (M) Sdn Bhd v Bumiputra Commerce Bank Bhd [2011] MLJU 400; [2011] 1 LNS 414, HC (refd)

Melewar Apex Sdn Bhd v Malayan Banking Bhd [2007] 3 MLJ 687, HC (refd)

Re LY Swee Co Sdn Bhd [1970] 2 MLJ 107 (refd)

Redmond v Allied Irish Bank Plc [1987] FLR 307, QBD (refd)
Royal Products Ltd v Midland Bank Ltd [1981] 2 Llyod's Rep 194, QBD (refd)
Satish Jayantilal Shah v Pankaj Mashruwala (1996) Crim LJ 3099 (refd)
Selangor United Rubber Estates Ltd v Cradock (No 3) [1968] 1 WLR 1555 (refd)
Siaw Kim Seong v Siew Swee Yin (f) & Anor [2009] 1 MLJ 349, CA (refd)
Syarikat Islamiyah v Bank Bumiputra Malaysia Bhd [1988] 3 MLJ 218, HC (refd)
Tan Kah Khiam v Liew Chin Chuan & Anor [2007] 2 MLJ 445; [2006] 4 CLJ 715, CA (refd)
United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182, SC (refd)

Legislation referred to

Companies Act 1965 s 156
Evidence Act 1950 s 73(1)

Paari Perumal (Puthan Perumal with him) (Perumal Brothers) for the plaintiffs.
SY Ng (Raja Darryl & Loh) for the first defendant.

Hadhariah JC:

INTRODUCTION

[1] This case is about an unscrupulous trader and an irresponsible bank officers had caused the plaintiffs' monies kept in the bank accounts maintained by the first defendant's bank were debited and channeled to the second to fourth defendants' account without the knowledge and authority of the plaintiffs, resulting in the plaintiffs to suffer losses in millions of ringgit. A brief introduction of the parties is necessary to appreciate the facts.

THE PARTIES

[2] The first plaintiff is a company who carries on the business of advertising services. The second plaintiff carries on business in advertising and general merchandise. The third plaintiff carries the business in motion pictures and other entertainment services. All three companies operate at Menara IGB, Mid Valley, Kuala Lumpur. The first defendant carries on banking business. It has a branch at Mid Valley, Kuala Lumpur. The second defendant carries on business as landscapers and beautification contractors at Mid Valley. The third defendant carries on business as general contractors including civil engineering at Seksyen 13, Shah Alam, Selangor. The fourth defendant is a director in the plaintiffs' company. He was also appointed as the group financial controller of the plaintiffs' company. Unknown to the plaintiffs, the fourth defendant was also the director in the second and third defendant's company. It is an undisputed fact that the second and third defendant's company are controlled

by the fourth defendant with him being the largest shareholder. These two companies had no business relation whatsoever with the plaintiffs. They are alien to the plaintiffs.

THE PLAINTIFFS' CLAIM

[3] The plaintiffs' claim against all the defendants are for:

(a) a declaration that the fouth defendant had acted in breach of his fiduciary duties owed to the plaintiffs;

(b) a declaration that the fourth defendant had acted in breach of trust;

(c) a declaration that in consequence of the lifting of the corporate veil of the second and third defendant, the assets of the second and third defendants belongs to the fourth defendant;

(d) an order that the second, third and fourth defendants jointly and/or severally liable to pay the plaintiffs RM3,829,200.62;

(e) a declaration that the first, second, third and fourth defendants hold RM3,829,200.62 as constructive trustees of the plaintiffs and the first, second, third and fourth defendants are liable jointly and/or severally to repay the said sum to the plaintiffs;

(f) a declaration that the purported debit of the said the first, second, third and fourth accounts of RM11,599,734.82 by the first defendant was wrongful, improper, without authority and of no effect;

(g) an order that the first defendant do pay the plaintiffs RM3,829,200.62 for wrongful and/or improper debit of the said the first, second, third and fourth accounts;

(h) an order that the first defendant do pay the plaintiffs RM79,552.84 as debt paid to the first defendant by the first plaintiff to close the unauthorised account;

(i) alternatively, damages against the first, second, third and fourth defendants, jointly and/or severally, for breach of contract and/or negligence in the sum of RM3,908,753.46 to be paid to the plaintiffs;

(j) alternatively, damages against the first, second, third and fourth defendant, jointly and/or severally, for conversion and /or monies had and received in the sum of RM3,908,753.46 to be paid to the plaintiffs;

(k) an order that all assets and proceeds of the second, third and fourth defendants be followed and traced and thereafter applied to discharge the indebtedness of the second, third and fourth defendants to the plaintiffs respectively;

(l) an order that all monies belonging to the plaintiffs paid out by the first defendant to unknown parties, not specifically pleaded and claimed here, (but made known after discovery proceedings and disclosures) be repaid to the respective plaintiffs;

(m) interests on the sums claimed at such rate and for such period as the court shall deem just;

(n) costs; and

(o) such further or other reliefs that this court shall deem just.

CAUSE OF ACTION

[4] The plaintiffs' cause of action against the first defendant are for breach of contract, negligence and tort of conversion. The particulars of negligence pleaded are:

(a) failed to exercise reasonable care and skill in executing the plaintiffs mandate;

(b) failed to see the signature on the funds transfer written instruction and the said cheque were forged;

(c) failed to make enquiries with the plaintiffs; and

(d) acted negligently when opening the unauthorised account.

[5] The plaintiffs' cause of action against the second and third defendants are for monies had and received.

[6] The plaintiffs' cause of action against the fourth defendant are for breach of fiduciary duties, breach of trust and acted mala fide.

WRONGDOINGS COMMITTED BY THE FOURTH DEFENDANT

[7] As pleaded in the statement of claim, there are three wrongful acts allegedly committed by the fourth defendant:

(a) opening of an unauthorised account leaving a debt of RM79,552.84;

(b) unauthorised transfer of funds amounting to RM11,599,734.82; and

(c) unauthorised drawing of a cheque No 908711 belonging to the first plaintiff for the sum of RM2.3m.

THE TRIAL

[8] On the first day of the trial ie 21 November 2011, the second, third and

fourth defendants through their respective counsel admitted to the plaintiffs' claim and judgment was accordingly entered against the second, third and fourth defendants for prayer A, B, C, D, E, I, J and K of the statement of claim. At the same time the fourth defendant withdrew his counterclaim. The trial proceeded against the first defendant only. The fourth defendant was later on called as the second witness ('DW2') for the first defendant. The first defendant's only pleaded defence is that the opening of the account in question, the transfer of funds and the clearing of the said cheque were effected in accordance with the mandate and instructions given by the plaintiffs to the first defendant and that they did not breach the mandate, not negligent and did not commit a tort of conversion.

FACTS

[9] The plaintiffs were customers of the first defendant. Each of them maintained a separate account at the Mid Valley (the said branch) as follows:

(a) the first account, No 2140–9900–033455 by the first plaintiff;

(b) the second account, No 2140—9900–041571 by the first plaintiff;

(c) the third account, No 2140-9900-050317 by the second plaintiff; and

(d) the fourth account, No 2140–9900–056404 by the third plaintiff.

[10] The mandate given by the plaintiffs to the first defendant is all banking transactions involving all the four accounts was a joint signatory of the fourth defendant and the chief executive officer ('CEO') of the plaintiffs, one Dato' Shafri bin Mohamad ('PW4').This mandate is found on pp 595 and 615 of bundle D. The authorised signatures and the companies chop are that as appears in the specimen card provided to the first defendant. The fourth defendant was wholly trusted by the plaintiffs and PW4 to supervise, control and manage all banking and financial affairs of the plaintiffs with the first defendant. The fourth defendant misused the trust.

[11] On 23 January 2006, the fourth defendant opened an account No 2140–9900–057354 (unauthorised account and also known as project account) with the said branch without any authorisation by the first plaintiff. This account was opened with the fourth defendant submitting two written documents: i) account opening form at pp 1085–1086 bundle F(D101) and ii)directors' circular resolution dated 18 January 2006 at p 1079 bundle F (P7). Both documents were purportedly signed by PW4. In reliance of these two documents, the first defendant approved the opening of the account. When showed D101 and P7, PW4 testified that although the scribble on the form and the resolution looks like his signature but it is not his signature as he did not sign them. He came to know about the existence of this account only after

the fourth defendant resigned from the plaintiffs' company. It was brought to his attention by Miss Cheah Wei Chen ('PW5'), the group accountant who had accidentally came across a bank statement lying on the fourth defendant's table, bearing the first plaintiff's name. After looking at it, PW5 notified PW4 that the account was not a known bank account number to the first plaintiff. PW4 further confirmed the first plaintiff never operate this account. Instead, this account is operated by the fourth defendant by himself when he illegally utilised the overdraft facility granted by the first defendant to the first plaintiff. For the misdeed committed by the fourth defendant, the first plaintiff had to pay to the first defendant RM79,552.84 on 24 September 2008 to close the account as there was an overdrawn amount under an overdraft facility. Thus, the first plaintiff had suffered a loss of RM79,552.84.

[12] Between January 2006 to June 2008, without the knowledge of the plaintiffs and PW4, the fourth defendant fraudulently caused 61 unauthorised transfer of funds of various amount from the plaintiffs' four accounts into the accounts of the second and fourth defendant maintained with the first defendant at the said branch. Detailed particulars of the transfers were listed in para 19A–19 1 of the amended statement of claim. These transfer were effected with written instruction titled 'Transfer of Funds' using the first plaintiff letterhead or the first defendant application form titled 'Re: Authorisation to Debit Account' purportedly signed by PW4 and the fourth defendant were issued to the first defendant. These written instruction (a total of 60) can be found on pp 1017–1067 of bundle F and marked as exhs P10–P67. The first defendant debited the plaintiffs' four accounts with the amount of the funds transfer. The total sum debited amounting to RM11,599,734.82. The plaintiffs only knew about these transfer of funds in the second week of January 2009 after having obtained statements and information from the first defendant. PW4's quick reply when shown the original copy of P10–P67 are:

(a) all the transfers were not authorised by the plaintiffs;

(b) he did not sign all the documents;

(c) it is not his practice to pre-sign blank transfer instruction;

(d) he did not pre-sign P10–P67; and

(e) P10 –P67 are not a valid mandate of the plaintiffs to the first defendant to debit the plaintiffs four accounts.

[13] Fortunately, the fourth defendant admitted to making the transfer. He later repaid into the plaintiffs' accounts and also make payments in kind amounting to RM10,070,534.20. After deducting the repayments made, the amount of losses suffered by the plaintiffs are RM1,529,200.62.

[14] As if not enough taking out RM11,599,734.82, the fourth defendant

then, without the first plaintiff's knowledge and authority drew a cheque No 908711 belonging to the first plaintiff for the sum of RM2,300,000 in favour of the third defendant. The said cheque was purportedly signed by PW4. The cheque was honored by the first defendant and the plaintiffs' first account was debited with the amount of the said cheque. In none of the transactions mentioned thus far did the first defendant call the plaintiffs' or PW4 to verify whether the instructions are authorised or not. PW4 denied signing the cheque and that his purported signature appearing on the cheque is forged. Needless to say, the first plaintiff suffer a loss of RM2,300,000. Having discovered the misappropriation much later, PW4 then lodged Brickfields Report No 1486/09 on 30 January 2009, exh P4. The plaintiffs main complaint against the first defendant is the transactions were not authorised nor mandated by them. Hence, the first defendant do not have the authority or mandate to pay out or debit the plaintiffs' accounts. On that premise the first defendant must be made liable to the plaintiffs.

[15] The issues before the court are:

(a) whether PW4's signatures appearing on exhs D101, 97, P9, P10–P67 were forged?;

(b) whether the first defendant was negligent and had breached their contract with the plaintiffs?; and

(c) whether the first defendant is liable to make good the losses suffered by the plaintiffs?

FORGERY

[16] In the back of my mind, I wonder whether the fourth defendant's admission of liability meant he admit to have forged PW4's signatures? Putting that aside, I will nevertheless proceed to examine the evidence whether forgery is the case here. As the party who assert forgery, the burden to prove that fact lies on the plaintiffs; see *Syarikat Islamiyah v Bank Bumiputra Malaysia Bhd* [1988] 3 MLJ 218; *Formosa Resort Properties Sdn Bhd v Bank Bumiputra malaysia Bhd* [2011] 4 MLJ 651. The standard of proof required is on the balance of probabilities; see *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182. However, there is no requirement that the plaintiffs must prove that it was the firth defendant who forged PW4's signatures on exhs P7, P9, P10–P67 and D101; see *Melewar Apex Sdn Bhd v Malayan Banking Bhd* [2007] 3 MLJ 687. In deciding whether forgery is proven or not, I take into account the following evidence:

(a) expert evidence;

(b) the court's own comparison;

(c) PW4's evidence;

(d) the fourth defendant's admission; and

(e) the first defendant's witnesses testimony.

Expert evidence

[17] To prove PW4's signatures on P10–P67 were forged, the plaintiffs called a document examiner from the chemistry department, one En Iskandar Azaman ('PW1'). I accept him as a qualified examiner based on the supporting documents produced in court. His testimony was he was asked by one Inspector Alwizan ('PW2') to examine questioned signatures in 59 documents contained in envelope marked 'X' and to compare them against 12 specimen signatures of Dato' Shafri bin Mohamad ('PW4') on 15 documents, contained in an envelope marked 'Y'. The 59 documents in envelope 'X' consist of written request for transfer of funds which is similar to the ones in pp 1017–1067 bundle F. He then prepare a report dated 18 July 2011 (P3). In his report, PW1 states his opinion as follows:

(a) 31 out of the 59 questioned signatures were not written by PW4;

(b) 24 questioned signatures were most probably not written by PW4;and

(c) 4 balance questioned signatures, he was not able to ascertain whether they were written by PW4 or not.

[18] Miss SY Ng for the first defendant attacked En Iskandar's evidence on the ground the report, P3 is not conclusive. Hence, she submits this court *cannot* rely on the said report. She gave her reasons as follows:

(a) sample signatures given by PW4 was from his own documents and not independent documents;

(b) PW1 only examined limited documents and not other documents which are not in dispute;

(c) the signatures in envelope 'X' and 'Y' were authored at different times, on different materials and on different surfaces. Hence, PW1 himself agrees no signature can be exactly the same; and

(d) PW1 never look at PW4's specimen signature on the specimen card.

[19] Miss Ng support her contention with a statement of law which was quoted with approval by the Supreme Court in *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182 at p 187. That statement of law is the evidence of an expert on handwriting unsupported by cogent data showing the process by which he came to his conclusion is not worth the paper

on which it is written. Simply put, it is not safe for court to rely on handwriting expert report if there is no concrete footing to support the finding made. Keeping in mind this principle of law, I am also aware that it is generally understood that the opinion of an expert such as PW1 is not conclusive and not binding on this court. Whether or not PW4's signatures on P10–P67 were a forgery is a question of fact, the finding of which is to be made by the court and not PW1. Responding to the argument put forth by Miss SY Ng, I had this to say. Having seen and heard PW1 gives evidence, it is my finding that:

(a) PW1 was only asked by the police to compare questioned signatures in envelope 'X' against the specimen signatures in envelope 'Y'. He was not asked to do comparison between questioned signatures in envelope 'X'. It does not serve any purpose to do so because logically comparison has to be between genuine signature of PW4 and the one he purportedly made;

(b) he did not compare the questioned signatures with PW4's specimen signature in the specimen card because neither was he given the specimen card nor was he asked to do the comparison; and

(c) this witness has explained how he had derived to three different conclusion.

[20] Thus, it is my opinion that PW1 had done his duty. There is nothing left undone. I agree that no signature can be exactly the same if written on different material etc. But this is a witness who not only look at the signatures, but he also looked for similarities and differences in the characteristic of the signatures by using a magnifying glass to enlarge the signatures. In this case, PW1 gave his reasons why he says 55 out of 59 signatures were not written by PW4 is because he finds there were sufficient significant differences in the characteristics of the signatures. I understand and accept his reasoning. So, the report P3 does not fall within the category suggested by Miss SY Ng. I can rely on P3 as an aid to support whatever finding I may make later on.

The court's own comparison

[21] Section 73(1) of the Evidence Act 1950 (the Act) is an enabling provision under which the court may direct any person to give his specimen signature. That section provides:

> 73(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

[22] In *Siaw Kim Seong v Siew Swee Yin (f) & Anor* [2009] 1 MLJ 349, forgery on instrument of transfer was in issue. The plaintiff called a handwriting expert who testified that the instrument was indeed a forgery. In that case, the difference between the plaintiff's signature on the disputed document and his admitted signature is so obvious that one do not have to be an expert. But the learned trial judge reject the expert's evidence and accept the evidence of the defendant. On appeal, Gopal Sri Ram (JCA) held that the trial judge should have acted under s 73(1) of the Evidence Act 1950 and make the comparison between the disputed signatures and the samples signatures himself. His Lordship refer to an observation made by RR Jain J in *Satish Jayantilal Shah v Pankaj Mashruwala* (1996) Crim LJ 3099 in the followings:

> It is true that the court cannot be an expert and based its conclusions merely on comparison of signatures by itself. But it can definitely compare the signatures in light of other admitted evidence on record. In this case, I have gone through the judgment and nothing can be found that the court by becoming an expert and comparing signatures has arrived at any particular conclusion. The court has not made any observation like an expert's opinion. The court has not at all based its finding on such evidence and therefore, this contention has also no force in the eye's of law. under the law, the court has power to compare signatures/handwriting, strengthening its finding based on other cogent material and evidence on record. Therefore, there is nothing wrong if handwritings are compared to strength its finding.

[23] Pursuant to s 73(1) of the Act, I direct PW4 to give five specimen signatures which was marked as P113 for the purpose of comparison with other documents allegedly executed by PW4. I then compare P113 with P10–P67, P7, P9, D101 and the specimen card. On comparison, I found P113 bear similarities with PW4's signature on the specimen card and they (P113) look different from the signatures on P7, P9, D101 and P10–P67. In fact the difference are so obvious to the extent without an aid of the expert evidence, I personally can say PW4's signature on the disputed documents are a forgery. Visual examination seems to be suffice here. I therefore conclude the disputed signatures of PW4 on D101, P7, P9 and P10–P67 are not the signatures of PW4 and that these signatures are forged.

PW4's evidence

[24] PW4 has testified on oath that he did not sign P7, P9, P10–P67 and D101. I find no reason to doubt his answer. He owns the plaintiffs' company. Logically, why would he want to transfer his companies money worth million of ringgit to another companies which he knew nothing about and had no business connection to his companies? Worst still the transfer were done frequently for 61 times. No right minded businessman would do that. So, his answer must be accepted as true. PW4 gives the reason why he says he did not

sign those documents. These includes for some of the transactions, he was away overseas, so there is no way he could have signed the transfer form. The other reason is because he does not know anything about the transactions. By this answer, he must have meant the account opening application form, transfer form/request and the cheque were not given to him for him to sign. PW4's answers must be looked at and interpreted in the context of the fourth defendant's admission. Their evidence compliment each other. With the surrounding circumstances of the case is favourable to PW4, I accept PW4's evidence that he did not sign all the disputed documents.

The forth defendant's testimony

[25] This is a witness who admits he prepared all the disputed documents. When asked whether the purported signature of PW4 on the disputed documents was that of PW4, his reply was 'Tandatangan adalah serupa seperti tandatangan Dato' Shafri Tak pasti itu adalah tandatangan Dato' Shafri'. He did not want to commit himself. When interpreted in a positive or negative manner, his answer means the purported signatures of PW4 on the disputed documents does not belongs to PW4. He admits he did not see PW4 sign on those documents. Surely he must have known who had signed the transfer request for 61 times. It is true that neither the plaintiffs bear the burden of proving who had forged PW4's signature nor this court is asked to make such a finding. Nevertheless, I felt compelled to do so because of the evidence led by the fourth defendant himself. It is this. His evidence was he obtained PW4's signature in either of these two way:

(a) he personally ask PW4 to sign if it is urgent; or

(b) he leaves the documents with PW4's personal assistant PA) if it is not urgent.

[26] Bearing in mind there are more than 61 disputed signatures, it is most impossible, close to absurdity to suggest PW4's PA had forged the signatures. There is no evidence to make such inference. With PW4's denial, there is every reason to believe the person who forged the signatures must be the fourth defendant. My reasons for saying so is this. He had all the opportunity to do so. PW4's signature is simple (easily copied), he is trusted by PW4, he control and manage the finance, most of the monies were taken out on urgent basis and the monies goes to his own companies, for his usage and benefits. Could I be wrong on this? I don't think so. He has admitted the monies he took belongs to the plaintiffs. That is why he repaid more than RM10m. I therefore hold PW4's signatures were forged by the fourth defendant.

Testimony of the first defendant's witnesses

[27] The relevant evidence would be from DW1 and DW4. Both are bank

officers who processed the transfer of funds request and the cheque. DW1 was asked to identify PW4's signature on the cheque for RM2.3m ('P9'), found at p 1077 bundle F. This witness gave the answer 'tandatangan nampak seperti tandatangan Shafri. Tapi tak jelas'. Meaning he was not sure whether the signature belongs to PW4. I find this witness is not telling the truth. This witness just refused to admit PW4's signature on the cheque is different from the specimen card. DW4 is the bank branch manager at the material time. His testimony is he did not verify PW4's signatures against the specimen card. He memorise PW4's signature. Yet, this witness had the gut to say PW4's signatures were not forged.

[28] I believe I have exhausted all the evidence. They can be summarised into four categories:

(a) witness who look at the signatures, make a comparison, search for its similarities and differences and noted it down;

(b) witness who look at the signatures, notice dissimilarity and chose to ignore them;

(c) witness who, in all probabilities must have copied PW4's signatures; and

(d) witness who did not even look at the signatures.

[29] Of the four categories, I chose to accept category (i) as that is the correct method to see whether there are any discrepancies in signatures. With the aid of expert report P3 coupled with the finding made by me on comparison pursuant to s 73(1) of the Evidence Act 1950, the evidence of PW4 and admission by the fourth defendant, I hold the plaintiffs have successfully proved on the balance of probabilities that PW4's signatures on all the disputed documents were forged. Consequentially, those documents could not constitute a valid mandate or authorisation from the plaintiffs to the first defendant. The whole transactions were a nullity.

NEGLIGENT AND BREACH OF CONTRACT

[30] The law of banker-customer relationship as I understand it is in carrying out the instructions of a customer, a banker acts under a mandate from the customer. Inherent in the mandate of a customer is the duty of a banker to carry out the mandate with reasonable care. In *Redmond v Allied Irish Bank Plc* [1987] FLR 307, Saville J said at p 310:

> There is clear authority for the proposition that a bank owes its customer a duty to take reasonable care and skill in interpreting, ascertaining and acting in accordance with the instructions of his customer.

[31] A banker is only entitled to make payment on behalf of a customer if he has the mandate of the customer to do so. If the money in a customer's account is paid away by a banker without the proper authority of the customer, the banker has no right to debit the customer's account; see *Bale v Parr's Bank Ltd* (1909) 25 TLR 549.

[32] Not only the payment must be in accordance to the authority of the customer, but the banker also must ensure the person who is being paid is entitled to receive the payment; see *Bank of Montreal v Dominion Gresham Guarantee and Casualty Co Ltd* [1930] AC 659.

[33] It has been held that transfer of funds is an ordinary banking operation and in carrying out the transfer, the bank owed the customer the usual banker-customer duty to exercise reasonable care and skill; see *Royal Products Ltd v Midland Bank Ltd* [1981] 2 Llyod's Rep 194. The test of reasonable care and skill is the usual standard of care which an agent ought to exercise in carrying out its principal's instructions; see *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555.

[34] The first defendant is fully aware they had to follow the plaintiffs' mandate. So, they say they have complied with the mandate. Whether that averment is true or not, need to be examined by this court. The first defendant's branch manager, DW4 in his testimony has alleged that the mandate is not the specimen card but the director's resolution. By giving such an answer, this witness has exposed himself to be labeled as not being truthful. There is a world difference between resolution and mandate. *Osborn Concise Law Dictionary*, (8th Ed), defined mandate as a direction, request or authoritative command. Learned author of *Handbook On Company Secretarial Practice in Malaysia*, (3rd Ed), at p 211 explain a resolution (ie the result of something being resolved) has been accepted or voted or agreed to by the necessary majority. A resolution is therefore a proposal submitted to a meeting that has been carried at the meeting. It is a decision or expression of intention of a meeting. Thus, a resolution is passed at the meeting and is recorded as such in the minutes. The difference between the two is the former is an instruction to the bank whereas the latter is an accepted proposal between company's directors. What is pertinent for me to note is DW4 has not shown to this court, let alone explain which part of the resolution tells the bank manner authorised signatures ought to appear, I reject his answer. The mandate is the specimen card.

[35] I shall first deal with the opening of the unauthorised account No 2140–9900–057354. As I have held PW4's signature on the application form (D101) and directors' circular resolution (P7) are forged, I shall not deal with it again. Instead I shall focus on the plaintiffs' complaint that they did not issue the resolution and it is not valid. The plaintiffs' company secretary, En Fadir

(PW3) told the court he did not prepare the resolution and have not seen it before. He states P7 is suspicious and a fabrication. He gave the following reasons:

(a) the spelling of Astana International is wrong with alphabet 'a' missing from the word 'international';

(b) article 109 of the Company's Article of Association was wrongly quoted when the correct one is article 90;

(c) the word 'jointly by any two' signatories were used when the correct term to use is 'jointly by the following';

(d) the plaintiffs do not have this resolution in their company's minute book;

(e) this resolution is not a certified true copy; and

(f) the format is different

[36] As usual, Miss SY Ng attack PW3's evidence on the ground there is a possibility the company itself has approved the resolution without giving a copy to PW3, to which PW3 agrees. She further contends all the defects mentioned by PW3 are mere technicalities and administrative. Whilst I may agree that the missing 'a' in the word 'international' could well be a spelling error, I disagree with the rest of her contention. It is not for the first defendant as banker to say the defects are irrelevant. Instead it is their duty to look for defects and informed the plaintiffs if there are any. I think in their banking practice, the first defendant must have seen thousands of directors' resolution and how its contents normally looks like. There is a vast difference between article 90 and 109. For ease of reference, I reproduce them below.

> Article 90 reads:
>
> A resolution in writing, signed by all the directors for the time being entitled to receive notice of a meeting of the directors, shall be as valid and effectual as if it had been passed at a meeting of the directors duly convened and held. Any such resolution may consist of several documents in like form, each signed by one or more directors.
>
> Article 109 reads:
>
> A notice may be given by the company to the joint holders of a share by giving the notice to the joint holder first named in the register of members in respect of the share.

[37] I believe the first defendant is aware now that article 109 has nothing to do with directors' resolution. It is not open for the first defendant to say they are not aware of this difference at the material time. There are a few directors resolution from the plaintiffs to the first defendant which quoted article 90; see p 588 bundle D. If the first defendant read the resolution they would surely

notice this difference and it would put them on notice that this resolution is invalid. Another point I take into account is the fact that this resolution is not reflected in the company's minutes book. Section 156 of the Companies Act 1965 requires the minutes to be entered in the book within 14 days of the date of the resolution and if not done then the resolution is invalid. This is a mandatory requirement. In this case, there is a contravention of s 156. I therefore hold the resolution is not valid. If any case is required to illustrate on the effect of non-compliance with s 156, please see *Re LY Swee Co Sdn Bhd* [1970] 2 MLJ 107. I think non-compliance with s 156 is the strongest point that work against the first defendant. The final point I think worth mentioning is the word 'jointly by any two' is the most inappropriate term to use when there is no option given to the first defendant. I am satisfied with PW3's evidence that there are major defects in the resolution to cause concern to the first defendant to make a query to the first plaintiff or PW4 to find out whether the resolution is genuine or fake. This they failed to do. When the defects are so obvious, it is unreasonable for the first defendant not to make query from the plaintiffs. For failure to make a query, the first defendant must be held to be negligent. For the reasons mentioned earlier coupled with the fact that PW4's signature on the resolution is a forgery, I hold the resolution dated 18 January 2006 is not valid. Consequently, the first defendant must be held to be negligent in opening account No 2140–9900–057354. This finding is fortified by the surrounding mystery behind the account It is this. The first defendant's own document at p 1085 bundle F show the account was opened on 23 January 2006. But, at p 1084 of the same bundle, there is a letter dated 18 January 2006 purportedly signed by PW4 and the fourth defendant containing this bank account No 2140–9900–057354 addressed to Petrosains Sdn Bhd with instruction to make payments into the said account. PW4 denied signing this letter. With the account is opened on 23 January 2006, how is it possible to make payment into the account on 18 January 2006. The first defendant, through their witness, DW3 attempted to explain the discrepancy by saying p 1084 is backdated. The truth is DW3 had not seen p 1084 and she had zero knowledge of the same. I reject her evidence. The unexplained discrepancy remain a mystery. This only show how negligent is the first defendant in their dealing with the first plaintiff.

[38] I now move to the unauthorised transfer of funds. Evidence led before the court revealed that the practice adopted by the first defendant in debiting the plaintiffs' accounts are simply:

(a) they accept application forms titled 'Authorisation to Debit Account';

(b) they also accept plaintiffs' letterhead titled 'Transfer of Funds';

(c) they accept the written request although the rubber stamp appearing on the letter differs from the one in the specimen card;

(d) they approved the transfer of funds although the application forms or request were sent to places other than the branch at which the plaintiffs maintain their account; and

(e) authorised signatures on all the transfer forms and the cheque are verified through memory of the bank officers processing the payments without looking and comparing them with the signatures on the specimen card.

[39] When PW4 was asked whether P10–P67 constitute a valid mandate of the plaintiffs to the first defendant to debit the accounts, his answer is 'no'. Amongst other reasons he gave are as follows:

(a) his signatures on these documents differs from his signature on the specimen card in the custody of the first defendant;

(b) there are instructions not prepared on the plaintiffs' letterhead;

(c) some instructions are without the plaintiffs' authorised rubber stamp as per the specimen card; and

(d) some of the purported instructions contain his signature even though on the said dates, he was overseas.

[40] The first defendant say they have followed the plaintiffs' mandate. Their reasons are simple. As banker they don't require their customer to fill in and submit a specific form for transfer of funds, as long as the instruction is in a written form. Next, they say there is no requirement for rubber stamp. So, even though they notice the rubber stamp is different, it does not matter. If application forms are sent to different places, they will fax the specimen card to the place concerned for verification. As the fourth defendant attended the bank often, they have memorised the signatures. They did not verify with PW4 because there was a mysterious instructions from top secret officer that there is no necessity to call PW4 because PW4 is a very busy man and even if the first defendant call, PW4 would reply 'refer to the 4th defendant'. My response to these answers is they are all absurd. These answer were an attempt by the first defendant to cover their mistake in trusting the fourth defendant 110%. Because of this trust, the first defendant simply brush aside the plaintiffs' mandate. They did not look at the authorised signatures and rubber stamp. To them, the plaintiffs' authority and approval is the fourth defendant. So, the real reason why they did not verify with PW4 is because they trusted the fourth defendant not because of mysterious instructions. A prudent banker in similar circumstances will verify PW4's signature against the specimen card and would notice the discrepancy in the signatures, the discrepancy in the rubber stamp, would realise that the fourth defendant could have misappropriated the plaintiffs money due to the frequency of funds transfer and would have call the plaintiffs to enquire. The first defendant's duty is not to trust one of the signatory over the other. The first defendant's specific duty is to verify the

customers' signature. If the first defendant chose to dispense with ordinary precaution because it has complete faith in the fourth defendant's honesty, the first defendant cannot claim it has complied with the mandate if it turns out that the fourth defendant is not an honest person as they thought he is.

[41] But when the fourth defendant admitted to the wrongdoings, what else can the first defendant say apart the fourth defendant's instruction equal to plaintiffs' authority. The first defendant expect this court to believe for transfer of funds, there is no specific form to fill up? Judicial notice can be taken that in banking practice there will always be specific form used for different purpose eg depositing money, withdrawal etc. We could see many kind of forms in the bank. Assuming what the first defendant say is true, I think we need to know in what circumstances then, the first defendant used their application form titled 'Authorisation to Debit Account'?

[42] Another important point I wish to highlight is the effect of the fourth defendant's admission and evidence to the first defendant's case. It is this. By calling the fourth defendant as their witness, his evidence formed part of the first defendant's case; see *Mahadevan v S Lourdenadin* [1988] 2 MLJ 371; [1988] 1 CLJ(Rep) 168. The fourth defendant has admitted the transactions were unauthorised by the plaintiffs and he was not sure whether PW4's signatures on the exhibits belongs to PW4. It has been held that in a civil case, one party's evidence is the other's as well. So, a plaintiff may rely on the defendant's evidence to prove his or her case. The converse is also true; see *Tan Kah Khiam v Liew Chin Chuan & Anor* [2007] 2 MLJ 445; [2006] 4 CLJ 715.

[43] Applying that principle to this case, I was of the view that the fourth defendant's admission was sufficient proof of the plaintiffs' averment that these transactions were not authorised by them.

[44] Assuming I am wrong on this, I move on to evaluate the first defendant's case. DW4 says PW4's signatures on the exhibits were not forged and those were authorised transactions. His evidence is not supported by the fourth defendant's evidence. Instead they conflict to each other. The first defendant had two conflicting versions. One version could not be right. On the totality of evidence, I find DW4's version is not true. This witness has not impress me as a truthful witness right from the beginning. This is a witness who say there was internal audit investigation carried out arising from the plaintiffs' complaint. Yet, he can say he did not know the outcome of the investigation. This is also the witness who cannot explain why five transfer forms (pp 1058, 1069, 1087, 1088 and 1089 of bundle F) were not given to the police. It is obvious this witness is hiding the evidence.

[45] One thing I am certain after hearing the first defendant's witnesses

giving evidence is they are not a truthful witness. Their evidence are not cogent enough to convince me what they are doing is correct in the eyes of banking practice and in the interest of the public. They have clearly breach the mandate and is liable to the plaintiffs.

LIABILITIES

[46] Miss SY Ng for the first defendant argued the bank did not commit a tort of conversion and is not liable on the grounds:

(a) the bank had not obtained any benefit from the operation of the plaintiffs' accounts. All the monies were transferred to the defendants' accounts.

(b) the plaintiffs suffered no loss and secured their remedies in the judgment against the second, third and fourth defendants; and

(c) monthly statements were regularly sent to the plaintiffs and there were no complaint. Thus, the plaintiffs are estopped from claiming the bank was liable.

[47] When it has been established that the instruments relied upon by the first defendant are forged, can the first defendant raise such defences? I am afraid the answer is no. I think there is no answer for the first defendant to say they have not obtained any benefit out of this transactions. That is not the concern of the court. What this court is concerned is because of the first defendant's gross negligence, the plaintiffs have suffered losses. It is an established principle that the liability of a bank for making payment on forged instruments of its customer is founded on the tort of conversion, which is a tort of strict liability. A banker who pays out on such a forged instruments is absolutely liable to make good the loss. The forged instrument is a nullity and a banker has no authority, actual or implied from his customer to act upon it, see *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182.

[48] With regard to estoppel raise against the plaintiffs, I find such argument has no merit at all. It has been held that at common law a customer owes his banker only two duties. The first is to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery. The second is a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as the customer becomes aware of it. However, there does not exist at common law a further duty on the part of the customer to take precautions in the general course of his business to prevent forgeries on the part of his servants. Neither is there at common law, in the absence of a contract to the contrary, a duty imposed upon the customer to inspect his periodical bank statements to ensure that his account is being properly maintained by the bank; see *United Asian*

Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182 at p 183. I shared the same view with my learned brother Lee Swee Seng JC that it would take time to discover forgery; see *Globelink Container Line (M) Sdn Bhd v Bumiputra Commerce Bank Bhd* [2011] MLJU 400; [2011] 1 LNS 414. Hence, the fact that the plaintiffs never complaint of anything to the first defendant for five years could not be accepted as a valid defence.

CONCLUSION

[49] This is a simple straight forward case of the first defendant overly trusted one out of two authorised signatories to the extent verification of signatures were done by memorising the signatures and not by looking at the signatures and compare it with the specimen card. Such practice is illegal, wrong, against public interest and must cease immediately. This kind of practice is not approved by Bank Negara and must not be allowed to exist by court. The plaintiffs have proven their case of unauthorised transactions against the first defendant on the balance of probabilities. The plaintiffs have also proved that the first defendant had acted unreasonably in handling their accounts. The plaintiffs have further proved no prudent banker in similar circumstances would act in the manner the first defendant did. For their carelessness, I hold the first defendant is liable to the plaintiffs in the followings:

(a) the first defendant to pay to the first plaintiff RM79,552.84 as monies paid to the first defendant to close account No 2140–9900–057354;

(b) a declaration that the debiting of the plaintiffs accounts by the first defendant was wrongful, improper, without authority and of no effect;

(c) the first defendant to pay the plaintiffs RM3,829,200.62 being the losses incurred as a result of the wrongful debit of the plaintiffs accounts;

(d) interest at 4% on judgment sum from 4 June 2008 being the last date of unlawful debit to date of full payment; and

(e) costs of RM70,000 to be paid to the plaintiffs.

Plaintiffs' claim allowed with interest and costs.

Reported by Kohila Nesan